WONG GOE CHUAN

v.

RESOLUTION ALLIANCE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM J
[SUIT NO: D24NCC-332-10-2011]
4 MAY 2012

BANKRUPTCY: *Interest - Interest on debt - Whether defendant entitled to interest on outstanding amount in excess of six months from date of adjudication and receiving order - Whether only entitled to amount stated in proof of debt - Whether s. 8(2A) Bankruptcy Act 1967 applied retrospectively*

The plaintiff, who was married to ET Theseira, obtained a *decree nisi* dissolving the marriage and it was a term in the said *decree nisi* that ET Theseira should transfer all of his shares in the matrimonial property to the plaintiff, subject to the existing charge to Malayan Banking Berhad ('MBB'). However, a receiving and adjudication order ('RO/AO') was made against ET Theseira and a foreclosure proceeding was commenced against him and the plaintiff by MBB. MBB filed its proof of debt with the Official Assignee for RM437,049.62 but was informed that, pursuant to s. 8(2A) of the Bankruptcy Act 1967 ('the Act'), the bank was not entitled to interest on the outstanding amount in excess of six months from the date of the RO/AO order. Hence, MBB in its letter dated 21 June 2002 fixed the redemption sum in the amount of RM461,783. Subsequently, the loan due to MBB had been transferred and vested in the defendant and the defendant confirmed the redemption sum as RM461,783 on 12 August 2008. The plaintiff offered to redeem the property but was rejected and instead, the defendant demanded the sum of RM761,513.65. Hence, the plaintiff filed this application for a declaration that she was entitled to redeem the property from the defendant at the sum of RM461,783 and that the defendant was bound by the amount stated in the proof of debt and was not entitled to interest on the outstanding sum for a period of more than six months from the date of the RO/AO.

Held (allowing plaintiff's application with costs):

(1) The rationale behind s. 8(2A) of the Act is very clear and unambiguous in that the section predetermines the maximum interest that can be claimed by a secured creditor from whatever source. This was to prevent the secured creditors from claiming unlimited interest on the debt either from the security or from the guarantors or sureties. The section clearly provides that MBB and the defendant were not entitled to interest as MBB had failed to realise the security within six months from the date of the RO. (paras 19 & 20)

(2) The RO was made on 23 September 1992 when s. 8(2A) of the Act had already been in force *ie*, on 17 July 1992. Therefore, the question of giving retrospective effect did not arise at all. As such, s. 8(2A) applied with full force. (para 21)

(3) The crucial factor to consider was under the provision, when the RO was made as it was clearly provided that "no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order ...". Therefore, s. 8(2A) clearly prohibits the defendant from charging interest in excess of six months from the date of the RO/AO when the RO was made after the coming into effect of the amendment (*OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee;* refd). (paras 21 & 22)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysia Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

CIMB Bank Bhd v. Tan Kim Leong Holdings Sdn Bhd & Ors [2010] 1 LNS 104 HC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee [2003] 3 CLJ 161 HC ***(refd)***

RHB Bank Bhd v. Ya'akob Mohd Khalib [2008] 1 CLJ 80 HC ***(refd)***

United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor [2010] 9 CLJ 764 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 8(2A)
Contracts Act 1950, s. 6(b)

For the plaintiff - Francis Brigged; M/s Francis Brigged & Co
For the defendant - Jack Yow; M/s Rahmat Lim & Partners

Reported by S Barathi

JUDGMENT

Hasnah Mohammed Hashim J:

[1] Enclosure 1 is the originating summons (OS) filed by the plaintiff for the following declaration and orders,

(a) declaration that the plaintiff is entitled to redeem the property known as HS(D) 4551 PT No. 1620 Mukim of Kuala Lumpur from the defendant by paying to the official assignee the sum of RM461,783.

(b) a declaration that the defendant is bound by the amount stated in the proof of debt and letters of admission by Malayan Banking Berhad and the defendant itself that the redemption sum is RM461,783.

(c) a declaration that as the said Edward Thomas Theseira was adjudicated a bankrupt after the coming into force of the amendment to s. 8(2A) of the Bankruptcy Act 1967, the defendant is not entitled to charge interest on the outstanding sum for a period of more than six months from the date of the receiving and adjudication order.

(d) an order that upon settlement of the redemption sum, the defendant to deliver the original issue document of title and duly executed and registrable discharge of charge to the official assignee.

(i) an order that upon settlement of the redemption sum, the defendant to deliver the original issue document of title and duly executed and registrable discharge of charge to the official assignee.

(ii) an order that the official assignee do execute a valid memorandum of transfer to the plaintiff upon settlement of the redemption sum.

[2] The OS is supported by an affidavit affirmed by Wong Goe Chuan @ Wong Yet Chuan on 29 September 2011.

[3] The affidavits filed and referred to are as follows:

(a) Defendant's affidavit in reply affirmed on 14 November 2011.

(b) Plaintiff's affidavit in reply affirmed on 29 November 2011.

(c) Defendant's affidavit in reply affirmed on 7 December 2011.

(d) Plaintiff's affidavit in reply affirmed on 19 December 2011.

(e) Affidavit of the official assignee affirmed on 19 December 2011.

(f) Defendant's affidavit in reply affirmed on 17 January 2012.

Brief Facts

[4] The plaintiff was at all material times married to Edward Thomas Theseira (hereinafter referred to as ET Theseira) and on 12 January 1990, a *decree nisi* was granted by the High Court of Malaya at Kuala Lumpur dissolving the said marriage. It was a term in the said *decree nisi* that the said ET Theseira shall transfer all his share in the matrimonial property known as HS (D) 4551 PT No. 1620 Mukim Kuala Lumpur, Daerah and Negeri Wilayah Persekutuan to the plaintiff subject to the existing charge to Malayan Banking Berhad (MBB).

[5] However before the said ET Theseira could take steps to transfer the property to the plaintiff, a receiving and adjudication order (RO/AO) was made against ET Theseira on 23 September 1992 in Kuala Lumpur High Court Bankruptcy No. D3-29-1278-1991. Sometime in 1992, MBB commenced foreclosure proceedings against ET Theseira and the plaintiff (Kuala Lumpur High Court Originating Summons No. 54-24-1071-1992).

[6] On 18 April 1994 MBB filed its proof of debt with the official assignee wherein the amount due from the said ET Theseira as at 23 September 1992 was stated as RM437,049.62. On 28 October 2000 the official assignee informed Malayan Banking Berhad that by virtue of s. 8(2A) of the Bankruptcy Act 1967, the said bank was not entitled to interest on the outstanding amount in excess of six months from the date of the RO/AO order.

[7] Subsequently on 21 June 2002 MBB wrote to the official assignee fixing RM461,783 as the redemption sum.

[8] By letter dated 9 June 2008, the said ET Theseira was informed by the defendant that by a vesting order dated 17 April 2008, the loan due to MBB had been transferred to and vested on the defendant. On 12 August 2008 the said defendant had confirmed that the redemption sum was RM461,783. On 28 January 2009 the official assignee then wrote to the defendant requesting for the amount outstanding as at 23 September 1992. The official assignee allowed the plaintiff to redeem the said property from the defendant and by a letter dated 22 October 2010, the plaintiff offered to redeem the said property for the sum of RM461,783. However on 15 November 2010 the defendant rejected the offer of settlement and instead demanded for a sum of RM761,513.65 as at 4 November 2010.

[9] Under the *decree nisi*, the said property is to be transferred to the plaintiff thereby giving her a vested interest in the property. The defendant is bound by the proof of debt filed by MBB fixing the outstanding sum at RM461,783 inclusive of interest. ET Theseira was adjudged a bankrupt after the amendment to s. 8(2A) of the Bankruptcy Act on 17 July 1992 and therefore the defendant is not entitled to interest in excess of six months from the date of the RO/AO.

The Plaintiff's Submission

[10] It is the submission of learned counsel for the plaintiff that a literal interpretation of the said section would clearly show that MBB and its successor, the defendant were not entitled to any interest on the debt of the failure of MBB to realize its security within six months from the date of the RO. Learned counsel referred to *United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor* [2010] 9 CLJ 764 and *OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee* [2003] 3 CLJ 161. In the *OCBC* case Low Hop Bing, J (as he then was) said that:

> "The phrase" Notwithstanding sub-s. (2)" in s. 8(2A) means that s. 8(2) is to be disregarded in so far as it is inconsistent with s. 8(2A) so that the provisions of s. 8(2A) shall prevail and play a predominant role to the exclusion of s. 8(2) which has been rendered subservient to s. 8(2A).

A The word "realise" in s. 8(2A) means "convert into money" (see *The Concise Oxford Dictionary* 9th edn).

That being the case, the plaintiff as a secured creditor under s. 8(2A) shall not be entitled to any interest in respect of the debt after the making of the receiving order on 4 October 2001 if the B plaintiff did not on or before 4 April 2002 convert into money the security ie, the land charged to the plaintiff. The act of converting into money is the act of receiving payment of the proceeds of sale from the successful bidder pursuant to the order for sale. This does not appear to be the case here and so after the making of C the receiving order on 4 October 2001, the plaintiff is not entitled to any interest in respect of the debt in question.

[11] The counsel for the plaintiff further submits that s. 8(2A) does not have retrospective effect as although the charge was created before the coming into force of the provision the RO was D made thereafter.

[12] It is the submission of the plaintiff that the defendant is estopped from claiming interest after the date of the RO for the following reasons:

E

(a) MBB had filed its proof of debt on 18 April 1994 stating that the amount owed was RM437,049.62 inclusive of interest and cost as at the date of the RO.

F (b) The OA wrote to MBB on 28 October 2000 informing that it was not entitled to interest six months after the date of the RO. MBB did not object.

(c) MBB wrote to the OA on 21 June 2003 stating that the redemption sum was RM461,783. 16 years after the RO.

G

[13] Therefore by virtue of the admission made by MBB as to the amount owing and subsequent confirmation by the defendant, the defendant is estoppel from claiming a sum higher than what was previously agreed. Further it is submitted that the plaintiff was H not in a position to settle the redemption sum by the date stated in the defendant's letter dated 12 August 2008 as she had not obtained permission from the OA to redeem the property. (re; *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysia Merchant Bank Berhad* [1995] 4 CLJ 283).

I

[14] In the present case from 1992 until 2010 MBB and its successor the defendant asserted that the outstanding was RM461,783. It was only in 2010 that the defendant demanded a higher amount.

The Defendant's Submission

[15] It is submitted that the redemption sum stated in the defendant's letter dated 12 August 2008 has lapsed since payment is required to be made on or before 31 October 2008. The time prescribed offering the redemption had lapsed. Since the defendant's offer had prescribed the time for the payment of the redemption sum then s. 6(b) of the Contracts Act 1950 shall apply and the offer or proposal is therefore revoked. No payment was made. The defendant is entitled to revoke and proceed with legal action for recovery of the total balance outstanding inclusive of interest. Learned counsel referred to the case of *CIMB Bank Bhd v. Tan Kim Leong Holdings Sdn Bhd & Ors* [2010] 1 LNS 104.

[16] With regards to interest in respect of the charge it is further submitted that the defendant is entitled to claim interest beyond the six months limitation under s. 8(2A) of the Act as the charge was created before the amendment was made and came into force. The Court of Appeal in *RHB Bank Bhd v. Ya'akob Mohd Khalib* [2008] 1 CLJ 80 said that s. 8(2A) of the Act was not intended to be retrospective.

Whether Section 8(2A) Bankruptcy Act 1967 Allows The Defendant To Charge Interest In Excess Of Six Months From The Date Of The RO/AO When The Said Orders Were Made After The Coming Into Force Of The Act

[17] Section 8(2A) of the Bankruptcy Act 1967 (the Act) provides:

> (2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

[18] Section 8(2) reads:

> This section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed - nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of the provisions of section 31 of the Employment Act, 1955 of the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.

[19] MBB became a secured creditor on 28 November 1983 and ET Theseira was adjudicated a bankrupt. A literal interpretation of s. 8(2A) of the Act clearly provides that MBB and the defendant are not entitled to interest as MBB failed to realize the security within six months from the date of the RO. Learned counsel referred to the case of *United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor* [2010] 9 CLJ 764 where Mohamad Zawawi J said that s. 8 2(A) of the Act is a '... "statutory clamp" on secured creditors prohibiting them from claiming any further interest on the debt after the statutory period. There is no exception to the said section.' His Lordship also referred to the Hansard of Parliament dated 14 May 1992 and 2 June 1992 where the debate of the proposed amendements to the Act was reported as follows:

> ... dibuat kepada seksyen 8 bagi memperuntukkan bahawa tiada apa-apa bunga boleh dibayar kepada pemiutang bercagar jika sekiranya pemiutang tersebut gagal menghasilkan cagarannya dalam tempoh 6 bulan dari tarikh perintah penerimaan dibuat. Rasionalnya ialah pada amalan biasa dan berdasarkan peruntukan yang sedia ada, didapati segolongan pemiutang bercagar mengambil masa yang terlalu lama untuk menghasilkan harta tersebut. Manakala, bunga yang perlu dibayar oleh penghutang berterusan sehinggalah jualan dilaksanakan. Perbuatan sedemikian adalah tidak adil kepada pemiutang yang tidak bercagar dan juga kepada penghutang.

[20] The rationale behind s. 8(2A) of the Act is very clear and unambiguous. The section predetermines the maximum interest that can be claimed by a secured creditor from whatever source. This is to prevent secured creditors from claiming unlimited interest on the debt either from the security or from the guarantors or sureties.

[21] Section 8(2A) of the Act came into force on 17 July 1992. In the instant case, as the RO was made on 23 September 1992, when section 8(2A) has already been in force therefore the question of giving retrospective effect does not arise at all. Hence, s. 8(2A) would apply with full force. The crucial factor to consider is under this provision when the RO was made as it is clearly provided that "… no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order …".

[22] Therefore s. 8(2A) of the Act clearly prohibits the defendant to charge interest in excess of six months from the date of the RO/AO when the RO was made after the coming into effect of the amendment. As Low Hop Bing J (as he them was) in *OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee* said "… it is incumbent on the court to give effect to the intention of Parliament which in its wisdom has expressly enacted in clear and unambiguous terms".

[23] Based on the reasons, encl. 1 prayer (1), (3), (4) and (5) is allowed with costs of RM3,000.